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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 156

ELMER F. REMMER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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to the United States Court of Appeals for the Ninth Circuit.

Petitioner Elmer F. Remmer, by his counsel, prays that a Writ of *Certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on May 23, 1955, affirming the judgment of the United States District Court for the District of Nevada.

I. OPINIONS BELOW

The opinion of the Court of Appeals, filed on May 23, 1955, is appended to this petition as Appendix A (*infra*, pp. i-iii). The prior opinion of the Court of Appeals dated May 28, 1953, is reported at 205 F. 2d 277 and is set forth at pages 3748-77 of the Record.[1] The Opinion, Findings, and Order of the District Court filed July 10, 1954, after a hearing previously ordered by this court in connection with extraneous jury contacts, is set forth at pages 33-39 of the Supplemental Record.[2]

II. JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals was entered on May 23, 1955 (Appendix B, *infra*, p. iv). An order staying mandate pending disposition of this Petition for *Certiorari* was entered on June 3, 1955 (Appendix C, *infra*, p. v). The jurisdiction of this court is invoked under 28 U.S.C., Section 1254. The District Court had jurisdiction under 18 U.S.C., Section 3231, and Rule 18, Federal Rules of Criminal Procedure.

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[1] Inasmuch as 9 additional copies of the Record have been filed pursuant to Rule 21(4), the opinions set forth therein are not appended to this petition. Rule 23(1)(i).

[2] The Opinion, Findings, and Order is not appended hereto for the reasons set forth in footnote 1. The entire record on the hearing conducted pursuant to the Supreme Court's prior order was ordered filed by the Court of Appeals as a Supplemental Record and will be designated herein as "Supp. R. ". The references to the original record will be designated as "R. ".

III. QUESTIONS PRESENTED

A. Questions Relating to Extraneous Jury Contacts

1. Where this court, on the basis of an affidavit setting forth newspaper stories to the effect that during a tax evasion trial a juror reported to the trial judge that he had been approached by an outsider with the suggestion that he "make a deal" with the defendant and that the trial judge and the United States Attorney had sent an FBI agent to interview the juror but had kept all these facts secret from the defendant and his counsel, has held that extraneous contacts with a juror raise a presumption of prejudice and has ordered the District Court to conduct a hearing to determine what occurred and to grant a new trial if the incidents are found to have been harmful:

(a) Is the scope of such hearing limited to the extraneous contact between the juror and the FBI agent, or does it include the extraneous contacts between the juror and the outsider, and between the juror and the trial judge?

(b) Does the scope of such hearing include a showing that a deputy United States Marshal inquired of another juror as to whether he had been approached and that the deputy marshal stated, in substance, that an effort had been made to approach a juror; or is the scope of the hearing limited to extraneous contacts involving only the one juror mentioned in the newspaper articles?

2. Where an outsider has stated to a juror during the trial that he knows the defendant, that the defendant received $350,000 "under the table" on the sale of a

business which is prominently mentioned throughout the trial, and that the juror should "make a deal" with the defendant, and (as a result of the juror's report of the incident to the trial judge) the FBI interviews the juror regarding the incident and then holds its investigation in suspense for over two months until after the verdict, and the juror is never advised of the falsity of the statement regarding the $350,000 and is never advised that the outsider actually had no connection with the defendant, is the presumption of prejudice overcome by a showing that the FBI agent advised the juror that he was investigating the outsider (rather than the juror)?

3. In such a situation, where the evidence of the statement regarding the alleged receipt of $350,000 in "under the table" money by the defendant was not disclosed until after the juror had left the stand at the hearing, and he was never recalled for questioning regarding it, and no evidence whatsoever was presented as to the impact of this remark on the juror, was the court justified in holding that the incident was in fact harmless?

4. In such a situation, is the presumption of prejudice simply a procedural rule which merely obligates the prosecution to come forward with the evidence of the extraneous contacts, or does the presumption require that the prosecution carry the burden of an affirmative showing that the defendant was not prejudiced by the impact of those contacts on the jurors?

5. In such a situation, where the extraneous contacts involve serious (but false) statements that the defendant is a tax evader, and a suggestion of bribery, and a statement by a deputy marshal to another juror that an at-

tempt had been made to influence a juror, is a new trial required unless the evidence shows that there was no reasonable possibility of prejudice to the defendant?

B. Questions Relating to Inspection and Production of Defendant's Business Records in the Possession of the Prosecution, Under Rules 16 and 17 of the Federal Rules of Criminal Procedure.

1. Does Rule 16 of the Federal Rules of Criminal Procedure, providing for a motion for inspection of records "at any time after the filing of the indictment," authorize the denial of a motion on the ground that it is not timely?

2. If timeliness is an element, does the Rule permit the time to be charged against the defendant, where he shows that the Government has contributed to the delay?

3. Does Rule 16 authorize the court, without itself examining the records, to substitute its judgment for the defendant's and to deny inspection of the records on the ground that it disagrees with the defendant's appraisal of the expected benefits?

4. Where defendant's motion specifies the type of business records and shows that they relate to the businesses from which the defendant is alleged to have derived his income, does Rule 16 require a showing of the specific pertinency of each individual paper?

5. Where there is no suggestion that compliance with the subpoena would have hampered the prosecution in any way, and the subpoena is served on the prosecutors several days before the trial, does Rule 17 of the Federal Rules of Criminal Procedure permit the quashing of a

subpoena for the production of defendant's business records in the prosecution's possession, and the denial of a motion for preliminary inspection of such records, on the grounds that the motion was not timely, that production of the records would not be beneficial to the defendant, and that the defendant had failed to show the specific need for any particular papers?

6. Is the denial of such motions under Rules 16 and 17, and the quashing of the subpoena, justified by the fact that, two years prior to the indictment, the Government afforded defendant's accountant an opportunity to examine such records in connection with the preparation of a Tax Court petition contesting civil tax deficiency assessments for the same years, where the civil assessments were based on computations and theories different from that on which the prosecution was based?

C. Questions Involving Application of Net Worth Method.

1. Where the prosecution by its own uncontradicted evidence shows that there was substantial cash at the starting point, may it submit net worth computations to the jury which designate the item of cash with a question mark and ignore it in computing the amount of income?

2. In such a situation, where the existence of cash in an undetermined amount is shown by the prosecution's uncontradicted evidence, does the defendant have the burden of proving the amount of such cash?

3. In computing income on the net worth method, must the traditional, basic distinction between the cash and the accrual methods of accounting be observed? Or may accounts receivable, arising from the extension of charge

account credit to customers, be included in the closing net worth of a cash basis taxpayer?

4. Where the prosecution refuses to produce, or to permit inspection of, a large quantity of the defendant's own records, has it made the full and fair disclosure required for the use of the net worth method?

5. Can a conviction on the net worth method stand where the defendant was precluded, by an erroneous ruling of the court, from introducing evidence of a substantial asset which was not included in the prosecution's starting point net worth computation?

6. Where there is no evidence of any particular item or category of unreported income, and the prosecution rests entirely on net worth computations, and the government is permitted to introduce a net worth exhibit which designates the amount of cash with a question mark, is it proper to refuse instructions which explain the circumstantial nature of the net worth method, the assumptions on which it rests, the importance of establishing the starting point net worth, and the burden of proof which the Government must carry?

7. In such a situation, is it sufficient for the court to instruct the jury only that (a) a defendant's net worth is the difference between all of his assets and all of his liabilities, (b) an increase in a man's net worth justifies the inference of taxable income if it is shown that he did not get it by gift or inheritance, and (c) non-deductible expenditures should be added to increase in net worth in arriving at taxable income?

8. Where the prosecution's net worth computations produce a tax deficiency primarily because they reflect

were used to siphon money secretly to appellant. On the contrary, the partners were all active in the supervision and conduct of the various businesses. One of the partners in 110 Eddy Street, Frank Cavani, testified that he was not consulted when Turner became a partner, but this occurred in 1943 during Cavani's long illness (which lasted almost a year) and Turner's entry into the business did not change Cavani's partnership interest. After Cavani's recovery, he and Turner actively managed the business even to the extent of deciding on their own responsibility what their own weekly salaries should be. (R. 2074, 2107, 2112-3, 2106-7.)

VI. ARGUMENT.

A. THE HOLDING OF THE COURT BELOW IN CONNECTION WITH THE EXTRANEOUS JURY CONTACTS IS IN CONFLICT WITH THE RULE FOLLOWED IN OTHER CIRCUITS, AND IT MISCONSTRUES THE MANDATE OF THIS COURT.

The holding of the lower court presents serious questions involving the right to a trial by a fair and impartial jury. The District Court refused to follow the rules applied in other circuits. In addition, it misconstrued the mandate of this court in holding that only the FBI aspect of the extraneous jury contacts was involved in the hearing which this court ordered on March 8, 1954.

The Court of Appeals, in reviewing Judge Goodman's findings pursuant to this court's remand of January 10, 1955, issued only a short *per curiam* opinion which neither states the issues raised by petitioner nor explains the court's reasons for affirming the judgment; and, since the

the disallowance of partnerships and the making of tec
nical accounting adjustments, and where the preparatio
of the partnership returns as well as the defendant's r
turns was supervised by accountants and bookkeepe
who had full knowledge of all the facts, is it proper fo
the court to refuse to instruct the jury on the differenc
between corrupt intent and an erroneous claim, betwee
good faith and bad faith, between deceitful concealmen
and honest error, and instead to instruct the jury that
"wilful" intent to evade taxes includes doing a thin
"without *ground* for believing it is lawful, or conduc
marked by *disregard* whether one has the right so t
act"? (Emphasis added.)

IV. STATUTES AND RULES INVOLVED.

The statutes and rules involved are set out in Appendix
I (*infra*, pp. xi-vii).

V. STATEMENT OF FACTS.

Petitioner was convicted in the District of Nevada on
February 22, 1952, after a trial lasting almost three
months, on four counts of tax evasion, of which two in-
volved his returns for the years 1944 and 1945, and two
involved the returns of his wife for the same years. The
jury disagreed with respect to two other counts involving
the returns of himself and his wife for 1946.

The case has been in this court twice before. On
November 16, 1953, this court granted a petition for *cer-
tiorari* which raised all of the questions involved herein

request for oral argument was denied, we have had no opportunity to ascertain, even by the inferences which may sometimes be drawn from the nature or tenor of judicial inquiry, the basis for the Court of Appeals opinion.

The District Court, however, clearly refused to follow the rule laid down by other circuits in *Stone v. United States* (CA 6, 1940) 113 F. 2d 70, 77; *Little v. United States* (CA 10, 1934) 73 F. 2d 861, 865; and *Ryan v. United States* (D.C. Cir. 1931) 191 F. 2d 779, 783. See also *United States v. Marine* (D.C. Del. 1949) 84 F. Supp. 785, 787.

These cases hold that, upon a showing of extraneous communications of a serious nature relating to the case (as distinguished from trivial departure from formalities, or casual conversation unrelated to the defendant or to the case), the presumption of prejudice requires a new trial unless the circumstances foreclose any reasonable possibility of harm.

In the language of the *Stone* case (113 F. 2d at 77):

> "The question is, not whether any actual wrong resulted from the conversation . . . under the circumstances related, but whether it created a condition from which prejudice might arise. . . ."

Judge Goodman's opinion specifically rejects this rule of law in the following language (Supp. R. 38):

> "But that means that decision would rest on conjecture and hypothesis and not fact. The Supreme Court had the power to decide the question involved as a matter of law. It did not do so. Hence our decision must be on fact."

(except that the facts relating to extraneous jury contacts had not at that time been developed). *Remmer v. United States*, (1953) 346 U.S. 884. On March 8, 1954, without passing on any of the other issues in the case, this court ordered a remand to the District Court to conduct the hearing requested by petitioner with respect to extraneous jury contacts and to grant a new trial if "the incident complained of" was found to have been harmful. *Remmer v. United States* (1954) 347 U.S. 450.

The District Judge assigned to conduct said hearing made an order on July 10, 1954, that the "incident complained of" was harmless. Thereafter, in August, 1954, petitioner filed a petition for rehearing with this court requesting that the case be restored to the docket and that the other questions involved in the writ of *certiorari* be decided (No. 304, October Term, 1953). On January 10, 1955, this court granted the petition for rehearing, restored the case to the docket, and remanded the whole record, including the findings and order of the judge who conducted the hearing on the extraneous jury contacts, to the Court of Appeals

> ". . . for its consideration on the errors assigned when the case was before the Court of Appeals before in order that the Court on the whole record may reconsider the case in the light of our recent decisions in *Holland v. United States*, 75 S.Ct. 127; *Friedberg v. United States*, 75 S.Ct. 138; *Smith v. United States*, 75 S.Ct. 194; and *United States v. Calderon*, 75 S.Ct. 186, and Judge Goodman's findings and order.
>
> "Mr. Justice Black would reverse the judgment of conviction and grant a new trial in view of the jury

A similar and even more pointed rejection of the *Stone* case is found in Judge Goodman's comment on that case during oral argument, where he stated that the *Stone* case was "inconsistent in legal reasoning" and would require the court to "enter the field of speculation" (Supp. R. 318).

The lower court's refusal to follow the objective test of whether the evidence foreclosed all reasonable possibility of prejudice, and its determination that there was in fact no harmful impact, is squarely contrary to the reasoning of the *Stone* case that bias and prejudice are often unconscious; that "inward sentiments cannot always be ascertained", and that whether a juror "leaned one way or the other because of the occurrence, is beyond ascertainment." (113 F. 2d at 77.)

Thus, the *Stone* case, as well as the others cited above, hold that the presumption of prejudice can be overcome only by a showing that there is no reasonable possibility of prejudice, whereas the lower court in this case openly rejected that rule.

This clear-cut conflict, on a question which is of fundamental importance to the right to jury trial in criminal cases, calls for review by this court.

Furthermore, the District Court's interpretation of this court's mandate was that the hearing should be concerned only with the effect of the FBI agent's interview with juror Smith, and not with the Satterly-Smith and Curnow-Boyd communications. Thus, in connection with oral argument, Judge Goodman stated (Supp. R. 275) that this court's remand

incident discussed in *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654."

Remmer v. United States (1955) 348 U.S. 904.

The Court of Appeals thereafter authorized the filing of concurrent supplemental briefs limited to the net worth issues. On petitioner's motion for permission to file *seriatim* briefs and to submit oral argument on the questions raised by the hearing on the extraneous jury contacts, the Court of Appeals enlarged the scope of the concurrent briefs to include the jury contact questions but declined to hear oral argument (Supp. R. 338-9). The judgment of the District Court was affirmed in a *per curiam* opinion dated May 23, 1955, which did not discuss any of the issues in the case (Supp. R. 341-2; Appendix A, *infra*, pp. i-iii).

This petition presents, therefore, substantially the same questions involved in the previous writ of *certiorari*, subject to these two qualifications: (1) The issues regarding the extraneous jury contacts are now presented in the light of a record showing what actually happened; and (2) the net worth issues in the case are limited to those which the lower court decided inconsistently with the principles laid down by this court in the *Holland* and related cases.

A. Facts Relating to Extraneous Jury Contacts.

There were four extraneous contacts with jurors. One was between jury foreman I. J. Smith and a James Satterly; a second was between Smith and the trial judge; the third was between Smith and FBI agent Callister;

> "was not for the purpose of considering whether or nor the contact of the witness Satterly with a juror was harmful or not. They have remanded it for the purpose of determining whether the contact of the FBI agent to the juror was harmful. That is the way the opinion reads to me."

Similarly, he stated that the Curnow-Boyd incident was not within the scope of the remand (Supp. R. 196). (Respondent's objection to the evidence showing that contact was also based on that ground. Supp. R. 195, 199.) While the court finally admitted the evidence, it repeated that this incident was not within the scope of the remand (Supp. R. 197) and indicated that it would be material only if directly related to the Smith-Satterly incident (Supp. R. 197-8).

This restricted view of the scope of the hearing is reflected in the fact that Judge Goodman's opinion (Supp. R. 33-39) is devoted almost completely to the FBI contact with Smith, in the constant reference in quotation marks throughout the opinion (six times in a seven-page opinion—Supp. R. 33, 34, 38, 39) to the phrase "the incident complained of" (with obvious reference to the FBI contact), and in the casual dismissal of the Smith-Satterly and the Curnow-Boyd incidents.

Moreover, the footnote which constitutes the only mention in the opinion of the Curnow-Boyd incident specifically declares (Supp. R. 36) that

> ". . . it had not the slightest bearing upon the subject matter of the hearing. . . ."

and the fourth was between juror Richard J. Carnow and a Deputy United States Marshal."

The fact that the first three contacts had occurred (but not the contents of the communications) first came to the attention of petitioner and his counsel from newspaper reporters the day after the return of the verdict, and his counsel thereupon filed a motion and supporting affidavit requesting a full hearing to develop all the facts regarding these contacts and any other improper communications which may have occurred. The fourth contact was not known to petitioner or his counsel until 1953.

The actual circumstances and content of these communications did not become known to petitioner or his counsel until June, 1954, when the hearing requested in February, 1952, was finally conducted pursuant to order of this court; and at that time the testimony suffered from the inevitable erosion of memory during the intervening two and a half years. As developed in the record, however, the following circumstances occurred.

On December 18, 1951, after the trial had been in progress approximately three weeks, jury foreman Smith was visited in his home one evening by James Satterly, who was a personal friend and an insurance client of Smith. Satterly discussed some changes in his automobile insurance policy and there was also talk about an accident he had had (Supp. R. 50). Satterly had worked as a crap-dealer in various gambling establishments in Reno, Nevada, and Smith knew that he was an ex-convict (Supp. R. 168). During the course of the discussion, Satterly

A reading of this court's opinion in ordering the hearing clearly shows that the purpose of the hearing was to develop all of the facts and circumstances relating to extraneous contacts with the jurors. The phrase "the incident complained of" which Judge Goodman's opinion quotes so frequently, was used in this court's opinion interchangeably with the plural word "incidents". And the reference to the effect of an FBI investigation of a juror's conduct was only by way of illustration, not of limitation of the scope of the hearing.

Finally, the evidence, which is uncontradicted in almost all significant respects, clearly does not support the conclusion that the presumption of prejudice was overcome. This is not the ordinary case of weighing the evidence. Rather, it presents a most serious question as to whether highly prejudicial statements to jurors can be dismissed as harmless, where no effort was made during the trial to point out the falsity of the statements or otherwise to neutralize them, and where the trial court and the prosecutors not only concealed the facts from the defendant but also took action which could only have emphasized to the juror the seriousness of the situation.

This court's prior opinion declares that "the burden rests *heavily* on the Government to establish .... that such contact with the juror was harmless." (347 U.S. at 229, emphasis added.) The evidence regarding the four extraneous contacts in this case shows that this burden was not carried.

1. *The Satterly-Smith contact.* This had two aspects:

(a) The false statement that Remmer had taken money "under the table" on the sale of Cal-Neva was

commented on Smith's status as a juror and made the following statement (Supp. R. 167):

> "I know Bones Remmer very well. He sold Cal-Neva for $850,000 on top of table—believe he got $350,000 under the table—Has about $300,000 that he daresn't touch—Why don't you make a deal with Bones?"

Smith noticeably raised his voice in replying that he was forbidden by the instructions of the judge to discuss the case (Supp. R. 128).

Two days later, on December 20, 1951, Smith reported this incident to Trial Judge Foley and quoted Satterly as having made the following statement (Supp. R. 134):

> "I know Bones Remmer. You are a member of the jury. Why don't you make a deal with him?"

After advising Smith that it sounded as though Satterly had been joking (Supp. R. 81, 134), Judge Foley held a meeting with Assistant United States Attorney Thompson and perhaps other members of the prosecution staff. At this meeting, it was decided to investigate the incident to see whether it had any connection with the defense, and it was also decided not to inform defense counsel in order not to frustrate the investigation (Supp. R. 135-7, 227-8).

Accordingly, on December 22, 1951, FBI agent Callister called on Smith and stated that he had been requested to conduct an investigation relating to Smith's talk with Satterly to determine whether an attempt had been made to exert any influence on Smith as a juror (Supp. R. 58, 152, 169-70). Callister made notes of what Satterly had

not discussed with Smith by either Judge Foley or the FBI agent. *And no inquiry was made at the hearing before Judge Goodman as to the impact of this remark on Smith*, since he was not recalled as a witness after the making of this remark became known at the hearing. The statement in Judge Goodman's opinion that this comment "in fact, under all the circumstances . . . was harmless" (Supp. R. 39) is made without benefit of any evidence whatsoever. There are no "circumstances" from which a finding of harmlessness could even remotely be inferred.

(b) The fact that Remmer had no connection with Satterly's suggestion of a bribe was never communicated to Smith during the trial. For all he knew, the Government was still investigating the incident—and in fact the decision to drop the investigation was not made until two weeks after the trial. Thus, realistically, Smith continued to serve as a juror with "the FBI . . . looking over his shoulder."

Would the Government have decided to drop this investigation if Remmer had been acquitted? Or would further investigation have then been made?

Far from showing that Smith put the whole thing out of his mind as a "joke", the evidence shows that he spoke of it as a possible "approach" to one of his fellow jurors on the way home immediately after the return of the verdict, and referred to it as a bribery suggestion in a discussion with an alternate juror a short time later (Supp. R. 184, 221). And he thanked another juror for participating with him in finding Remmer guilty and told

said to Smith and of Smith's relationship with and knowledge of Satterly, and of the fact that Satterly was moving to another state (Supp. R. 166-8).

On December 24, 1951, without having interviewed Satterly, FBI agent Callister reported to Assistant United States Attorney Thompson that there was nothing to indicate a connection between Satterly and the defense, and on Thompson's instructions he gave a similar report on January 4, 1952, to Judge Foley, who told him that "no further investigation was required at that time." (Supp. R. 157-8, 230, 233.)

Accordingly, the investigation was held in abeyance and no further work was done on it until approximately March 10, 1952, after petitioner had been convicted. At that time, in a meeting between Callister and Thompson, it was decided to terminate the investigation (Supp. R. 158, 230). No further information was conveyed to Smith at any time (Supp. R. 261). Thus, he was held in suspense throughout the trial as to the results of the investigation or whether it had been completed; and no effort was made to neutralize the effect of Satterly's false statements that he knew Remmer well and that Remmer had received "under the table" money on the sale of Cal-Neva. Nor was any inquiry made as to the impact on Smith of the "under the table" statement. On the contrary, the trial judge and the prosecutors were interested only in determining whether the defense had attempted to tamper with the jury (Supp. R. 137, 228).

And at the hearing in June, 1954, the fact that Satterly had made this statement regarding the Cal-Neva sale was not disclosed while Smith was on the witness stand;

and he was not recalled, after the development of this fact through Callister's testimony, for questioning as to the possible impact of this statement on him, nor was any effort made to inquire further into this phase of the matter. Judge Goodman made a finding that this remark about "under the table money" had been made (Supp. R. 34) but concluded, without any statement of his reasons or recital of facts upon which he relied, that the statement was harmless (Supp. R. 39).

On the way home from the court immediately after the verdict on February 22, 1952, Smith told juror Tinkham that it was possible he had been approached (Supp. R. 184), and he thanked juror Mack for finding Remmer guilty and said that someday he would tell her why he was so interested (Supp. R. 174, 177-8). Two weeks later, when he encountered alternate juror Morris, he related that he had been told during the trial that he could make a lot of money by stringing along with Remmer (Supp. R. 221).

In view of Satterly's statement to Smith that petitioner received $350,000 "under the table" on the sale of Cal-Neva, it is noted that petitioner's connection with Cal-Neva throughout the prosecution period was prominently mentioned in the trial (*e.g.*, Supp. R. 1593-6, 1903-17, 1925-35; 2218-21, 3027-36, 3073-4, 3114-16, 3602-6, 3612-13), and that his subsequent sale of Cal-Neva was also brought to the jury's attention a number of times (*e.g.*, Supp. R. 1930-3, 3029-36).

Satterly, incidentally, categorically denied at the hearing that the incident described by Smith had ever occurred, and his denial was corroborated by the testimony

of his wife, who was present during the conversation in which the incident occurred (Supp. R. 117, 125).

During the trial, probably in January, 1952, juror Curnow and Deputy United States Marshal Boyd had a conversation which led Curnow to believe that an attempt had been made to contact one of the jurors, and that the juror involved was probably Mrs. Mack. The details of this conversation are not clear, and Curnow's statements at various times regarding it are not entirely consistent.

On March 23, 1954, Curnow gave FBI agent McGee an affidavit (Ex. F, Supp. R. 210-11) reciting that during the trial Deputy Marshal Boyd asked him if he had heard of anyone on the jury being contacted, or had heard any discussion among the jurors indicating that a juror had been contacted; that he replied to Boyd in the negative; that at the time he thought Boyd's remark related to juror Mack, since he had seen her going into the Judge's chambers; and that later (it does not appear when) he learned that Mrs. Mack had been discussing an illness problem with the Judge.

Curnow told one of the defense attorneys in December, 1953, that an assistant marshal had asked him, about half way through the trial, if anyone had tried to approach him on the case and, when asked why he was inquiring, stated: "He tried to bribe one of the jurors." (R. 265.)

At the hearing in June, 1954, Curnow testified that one of the marshals asked him if he had heard any discussion by the jurors about anyone being approached; that he replied in the negative and asked why the question had been put to him; and that the marshal replied that he was

just curious (Supp. R. 200). He first testified that he did not know the name of the marshal (Supp. R. 203), but after his FBI affidavit was produced, he identified Boyd as the one who had talked to him, and conceded that he had known Boyd personally for several years (Supp. R. 208).

Boyd testified that he had known Curnow personally since 1948 and had participated with him in rifle and pistol shooting contests, but denied having had any such conversation with him (Supp. R. 249-252).

B. Evidence Relating to Inspection and Production of Records Under Rules 16 and 17.

The criminal indictment was filed on April 9, 1951 (R. 8). The case was set for trial on November 28, 1951 (R. 36). A motion for a bill of particulars was filed April 27, 1951, and denied June 15, 1951 (R. 10).

On November 9, 1951, petitioner noticed a motion for a continuance (R. 15-17), and on November 12, 1951, he noticed a motion (R. 17-20) for an order to inspect and take copies of certain books and records pursuant to the provisions of Rule 16, Federal Rules of Criminal Procedure. The records sought were described as "The books of account, journals, ledgers, cash books, expense books, vouchers and other records maintained by, or pertaining to the income and expense of," several named enterprises and any others from which the Government contends petitioner received income as an owner during the years 1944, 1945 and 1946.

Supporting affidavits were filed with the motions (R. 20-34). They recited that in 1949 the Government had

placed liens against petitioner's funds; that a certified public accountant who had assisted the petitioner prior to the indictment had withdrawn in 1950 because of petitioner's inability to compensate him for his services (R. 49); that petitioner's tax counsel had become associated with the case in March, 1951; that in September, 1951, a certified public accountant had finally been engaged; that on October 22, 1951, petitioner's counsel requested Government counsel to afford petitioner's accountant access to the records; that Government counsel first indicated that such inspection would be permitted if petitioner's counsel submitted a written statement of the businesses in which petitioner had an interest; that such written statement was submitted on October 23, 1951, and the request was pursued diligently until November 7, 1951, at which time petitioner's counsel received a letter from Government counsel advising that such inspection would be permitted only if petitioner first submitted the written consent of the third parties from whom the Government had obtained the records; that Government counsel refused to give petitioner's counsel the names of such third parties;[3] and that the records covered by the motion were material to the preparation of the defense.

The Government filed an affidavit in opposition (R. 35-41). This affidavit recited that certain records had been

[3]At the trial, it was developed that the agents obtained these records principally from two of petitioner's partners (Maundrell and Kyne) and two accountants (Ayton and Slater) (R. 2563-6). Both of the latter were deceased, and one of the partners (Maundrell) was in Honolulu at the time the "written consent" condition was imposed (R. 1394, 1559, 1593-7, 1765-6).

procured by the Government from third parties; that prior to the indictment certain of the records had been turned over to an accountant for his use in behalf of the petitioner; that the accountant had turned them over to one of the petitioner's attorneys who continued to hold them and that the accountant had been unable to return them to the Government in accordance with his agreement. These latter records were subsequently deposited with the clerk of the court, pursuant to an order of the trial judge, and made available to both parties during the trial (R. 928-929, 1151). Petitioner's motion covered a considerable quantity of original records such as adding machine tapes, bank statements, cancelled checks, dealers' daily reports, etc. (R. 48). These were never made available to petitioner during the trial (R. 2717, 2771, 3250), although they were actually in the court house (R. 2451, 3483-6).

Both of petitioner's motions were heard and denied on November 15, 1951 (R. 42, 3492). No error was assigned as to the denial of a continuance. The Court of Appeals upheld the denial of the motion to inspect on the grounds that prior opportunities which had been afforded petitioner's representatives to examine the material were sufficient (R. 3755), that the motion was not timely (R. 3756), and that no specific showing of prejudice had been made (R. 3758).

Pursuant to Rule 17 of the Federal Rules of Criminal Procedure, petitioner filed a motion on November 23, 1951, together with supporting affidavits filed November 26, 1951, and procured a subpoena (R. 46-7) for production and inspection of books, papers, documents and ob-

jects (R. 42-54). The prosecution filed a motion to quash the subpoena, based upon the earlier affidavit (R. 55-58). The petitioner's motion was denied and the motion of the prosecution was granted (R. 58). The Court of Appeals sanctioned the denial of petitioner's motion and the quashing of the subpoena because of the circumstances discussed in connection with the motions under Rule 16 (R. 3757). The Court of Appeals did not hold that compliance with the subpoena would have hampered the Government in any way, nor did the Government offer any evidence to that effect, either by affidavit or during the hearing on the motion.

C. Evidence Relating to Net Worth Issues.

The allegation of unreported income in this case rests entirely on net worth computations. There is no evidence that any particular transactions or categories of income were not reported.

1. Starting Net Worth.

The uncontradicted prosecution testimony shows that there was always cash in the safe deposit box in amounts —"sometimes . . . considerable and sometimes less"— which "varied every day" (R. 1536). The prosecution also showed on direct examination of one of its own witnesses that a specific check in the amount of $17,739.50 was cashed and the proceeds placed in the box on December 3, 1943, just 28 days before the starting point (R. 1483-5, 1539). There was no evidence that any such sum of money was removed by December 31, 1943, or that the box was substantially empty at that time. The prosecution's net worth exhibit shows a question mark, rather

than either a zero or some other figure, as the amount of "cash in Safe Deposit Boxes" (Ex. 183, item 25, R. 3613).

A judgment of $1,800 obtained against appellant by one Monahan in 1938 was not paid until 1945. However, by the prosecution's own computations appellant had a minimum net worth on December 31, 1943, of $141,837.42 (R. 3613) including $8,425.51 in three bank accounts (R. 3589, 3601); and there was no evidence from which it could reasonably be inferred that the nonpayment of this small judgment was due to lack of funds.

The evidence showed that petitioner had been one of the owners of Cal-Neva lodge since 1924 or 1926 (R. 1903). There was no showing as to what other interests he had then, or earlier or later, nor was there any evidence of a destitute financial history prior to the indictment period. And no attempt was made to establish a net worth at some prior time and bring it up to date through proof of his reported income or financial history during the intervening years.

Appellant offered proof that he had an additional asset of $10,000 at the starting point. This was the testimony of James Jeffress that in 1944 his father, Robert, who was deceased at the time of the trial, told him that he still owed appellant $10,000 which he had borrowed from appellant in 1943 (R. 3204-5). The offer of proof, based on the "Declarations Against Interest" exception to the Hearsay rule, was objected to on the ground that it was hearsay and was not the primary evidence of the transaction, and the objection was sustained (R. 3207-8). The record does not, therefore, include any proof of this asset.

is of itself a compelling showing of materiality. The mere bulk of the records maintained would be pertinent to show the efforts made to report the income accurately. If cash register tapes and dealers' reports substantiated the gross receipts shown on the return—a fact which petitioner could not determine without accounting analysis—that fact could have materially influenced the jury. This mass of documents undoubtedly contained a myriad of clues which might have been helpful to the defense. It might, for example, have included the written record of money placed in the safe deposit box which Kyne said he turned over to Slater and which was in Slater's possession when Kyne last saw it (R. 1559). Special Agent Weaver testified that, so far as he knew, he had obtained all of the records in Slater's possession (R. 2566).

The denial of petitioner's pre-trial motions, the quashing of the subpoena, and the summary denial of his further request during the trial for an opportunity to examine these records (R. 928-9), all left him on the wrong side of an opaque screen placed around his own records. The Government was permitted to reach behind this screen and produce what it wanted, but petitioner was told that he could not even examine any of this material unless he first pointed to the particular document he wanted and showed its specific materiality.

This requirement of X-ray vision is completely contrary to the purpose and policy of Rules 16 and 17. Those rules are based on a "more liberal policy" than theretofore existed and afford "discovery as to documents and other materials otherwise beyond the reach of the defendant which, as in the instant case, might be

2. Inclusion of "Accounts Receivable" in 1945 Closing Net Worth.

The prosecution's net worth computation at the end of 1945 includes an asset value of $23,293.99 for the B-R Smoke Shoppe (Ex. 183, R. 3612, line 2). This is made up principally of an item designated in Ex. 169 (R. 3601) as "Cash on Hand—Bankroll—Pritchett's testimony . . . 20,000.00". There is no testimony, by Pritchett or anyone else, of the existence of any such cash. On the contrary, when Pritchett was asked as to the amount of cash at the end of 1945, he stated that it was "around five thousand dollars cash" (R. 1949). In response to a further question regarding accounts receivable, he testified there was "around 15 thousand outstanding" (R. 1949). The evidence showed that the B-R Smoke Shoppe permitted some of its customers to bet on credit, and if they lost entered their losses in the book as "markers" until they were paid (R. 1360-61).

The removal of this $15,000 in "accounts receivable" from the 1945 closing net worth would completely eliminate the claimed deficiency for 1945, since the prosecution alleged an understatement of income of only $11,747.04 (Ex. 183, R. 3613).

3. Evidence of Willfulness.

As previously stated, there is no evidence that any transaction or any type of income-producing activity was concealed on the tax returns. The understatement of net income in this case is based on net worth computations which do not specify the source or nature of the alleged understatement. Analysis of the prosecution's computations shows, however, that the understatement consists

numerous and difficult to identify." *Bowman Dairy Company v. United States*, 341 U.S. at 218-20.

The Court of Appeals did not attempt to reconcile its holding with the basic policy statements expressed by this court in the *Bowman Dairy* case, but rather distinguished that case solely on the ground that the specific holding in *Bowman Dairy* dealt with the validity of an order directing the production of records, rather than an order denying a motion to produce.[7]

The refusal of the lower courts to follow the *Bowman Dairy* opinion, and the square conflict with the *Fryer* case, in which the Government's petition for *certiorari* was denied, call for review by this court. See also *Gordon v. United States* (1953) 344 U.S. 414, where the denial of a request for inspection of evidentiary material in the Government's possession was held reversible error even independently of specific provisions such as Rules 16 and 17.

C. THE LOWER COURT'S DECISION ON THE NET WORTH ISSUES IS CONTRARY TO THE PRINCIPLES ANNOUNCED BY THIS COURT IN THE HOLLAND AND RELATED CASES.

1. The Starting Point Was Not Established.

This is not a case in which the existence of cash at the starting point is just a theoretical possibility, or is based on the self-serving claim of the defendant. On the contrary, the prosecution's own evidence shows that there

[7]The trial court, in denying the motion under Rule 17, expressed doubt that the Supreme Court was serious in approving the portion of the subpoena and order involved in the *Bowman Dairy* case which called for production of "all documents, papers and objects" (R. 287).

of two things: (a) technical-type accounting adjustments, and (b) non-recognition of partnerships.

The total understatement of net income alleged in Exhibit 183 (R. 3612-13) for 1944 and 1945 is $43,494.95. Of this, $21,669.49 represents the capitalization, by the Government agents, of repairs, improvements, and excise taxes which they felt should, as a matter of proper accounting, be capitalized or added to inventory rather than be deducted as current expenses, as the following summary shows:

	1944	1945
Improvements at Menlo Club capitalized (See Ex. 165; R. 3597)		$ 920.00
Improvements at Mason Street capitalized (See Ex. 174; R. 3607)		7,489.76
Office safe capitalized (See Ex. 174; R. 3608)	$ 425.00	—
Liquor tax added to cost of liquor (See Ex. 175; R. 3609)	8,397.53[1]	
San Diego Social Club Expenses capitalized (R. 1268) appellant's half		4,437.20
	$8,822.53	$12,846.96

Another, $15,000 represents the accrual of the B-R Smoke Shoppe accounts receivable at the end of 1945, and the inclusion of this sum turns on whether accrual rather than cash accounting principles should be applied.

Thus, all but $7,000 of the total "understatement" of income consists, in reality, of these accounting-type adjust-

[1] Although the jury was instructed that the taxpayer had the option of either treating this tax as a deductible expense or adding it to the cost of the liquor (R. 145), it permitted the prosecution to include it in the net worth computations as a part of petitioner's investment in the liquor, notwithstanding petitioner's objection that it should be treated as a currently deductible item (R. 518).

ments. The remaining $7,000 is attributable to the non-recognition of the partnerships; and even that issue is immaterial since the existence of $7,000 or more in starting point cash was not foreclosed by the evidence.

The prosecution considered the total investment in various enterprises as the sole property of appellant. Its net worth computations, therefore, ignore the capital accounts, or equities, of the various partners who actually conducted those businesses, with the result that appellant is charged in this case with the income allocated to the respective partners on the tax returns and reported in their own tax returns. In essence, the basic partnership arrangement in each of these enterprises was as follows: (a) appellant arranged the purchases of the business and obligated himself to pay the full balance due; (b) appellant arranged with the partners for them to conduct the actual business, and agreed that (in addition to a weekly wage for working on the premises) each should have a specified percentage interest in the net profits, to be accumulated in the business until it equalled his proportionate share of the capital investment; (c) appellant was not personally active in any of the businesses except on matters of policy, and even there the management functions were performed principally by Kyne and Maundrell; (d) partnership returns were filed regularly, showing the amount of income allocable to appellant and to each of the other partners; (e) the equities of the various partners were reflected in the books, except in the B-R Smoke Shoppe, where the profits were distributed equally each year.

There was no evidence that the partnerships were fictitious or sham, or that the partners were "dummies" or

ible" net worth computed by the Government), there would be no basis whatsoever for claiming even inferentially that any gross receipts were omitted.

The evidence clearly does not foreclose "with reasonable certainty" that petitioner did not have $7,000 or more in cash at the starting point.

The decision here is contrary to *Costello v. United States* (CA 2, 1955) ___ F. 2d ___, 55-1 U.S.T.C. Par. 9342, where the Second Circuit held that the jury was not justified in inferring that the defendant did not have as much as $40,000 cash at the starting point, despite a prior financial history showing long delinquencies in the payment of substantial obligations.

The decision of the lower court also conflicts with the Fifth Circuit's recent holding in *Vloutis v. United States* (CA 5, 1955) ___ F. 2d ___, 55-1 U.S.T.C. Par. 9262, where, as here, the evidence showed that there was cash in some undetermined amount in a safe deposit box at the starting point. The Government's assumption in its net worth computations that there was no cash was held reversible error.

Furthermore, the refusal to permit petitioner to examine and use his own records violates the basic requirement, as set forth in the *Holland* opinion, that in a net worth case the Government must make a fair disclosure of what it finds.

Finally, the starting point lacks a solid foundation because of the exclusion of petitioner's proffered proof of the additional $10,000 owed to him by Jeffress at the starting point. This violates the *Holland* requirement

of full development of the starting point evidence. Respondent has abandoned its objection at the trial that this was hearsay and not the primary evidence (R. 3207-8), as well it must under the authorities. See 5 *Wigmore on Evidence* (3rd Ed.), Secs. 1420-22, 1456. The evidence was clearly admissible as a declaration against interest.

The Court of Appeals sought to justify this ruling solely on the ground that this evidence was offered in conjunction with other evidence relating to a 1946 loan, and was not separately stated. But there is no validity in this attempted justification of an obviously erroneous ruling. The fact that this evidence of the $10,000 loan was offered in an offer of proof which also included a declaration against interest of the same deceased as to the time of repayment of the $50,000 which he loaned to appellant on September 27, 1946 (evidenced by th note in evidence as Ex. A-1; see testimony at R. 1843-4) is of no significance. Each item was tated separately (R. 3204-5, 3206). Both were admissible under a recognized exception to the hearsay rule. The 1946 item is immaterial on this appeal only because the jury disagreed for that year.

Since this evidence went directly to the correctness of the prosecution's opening net worth, its exclusion was, in view of the large amount, highly prejudicial.

2. There Was an Improper Accrual of "Accounts Receivable" in the 1945 Closing Net Worth

As stated above, the prosecution's net worth as of the end of 1945 includes $15,000 in accounts receivable, or unpaid bets, of the B-R Smoke Shoppe. The impor-

tance of this item is clear from the fact that without it there would be no tax deficiency for the year 1945. The evidence is uncontradicted that these markers represented unpaid bets of patrons of the B-R Smoke Shoppe who were permitted to bet on credit. These markers, therefore, are in the same category as charge account sales made by a merchant, and on the cash basis of accounting they are not taxable as income until actually paid. There is no contention in this case that either the petitioner individually or the B-R Smoke Shoppe was on the accrual rather than the cash basis, nor do the facts warrant any such conclusion. Rather than face this issue of cash versus accrual accounting, the prosecution sought to disguise the true nature of this $15,000 in markers by lumping it into the total figure of $20,000 described in Exhibit No. 169 (R. 3601) as "cash on hand—bankroll—Pritchett's testimony." Pritchett's testimony makes it clear, however, that there was only $5,000 in cash at the end of 1945, and that in addition there were "accounts receivable" of approximately $15,000 (R. 1949). Petitioner made a timely objection to the inclusion of this amount in Exhibit No. 169 (R. 2499), to the introduction of Exhibit No. 169 with this item in it (R. 2500), and to the carrying forward of this figure into the overall net worth exhibit, No. 183 (R. 2856, 515, 516).

The Court of Appeals held (R. 3769) that these accounts receivable were properly included in the closing net worth "regardless of whether such markers should technically be treated as cash or accounts receivable", because they were collectible as a practical matter even

if not legally valid obligations. This, of course, misconceives the issue, which is whether the distinction between cash and accrual accounting may be ignored in computing income on the net-worth method.

In holding that Section 41 of the Internal Revenue Code of 1939 (which generally requires the Commissioner of Internal Revenue to use the same method of accounting as is reflected in the taxpayer's books) does not limit the use of the net worth method to situations in which the taxpayer has no books or where his books are inadequate, the *Holland* opinion specifically declares that Section 41 "refers to methods such as the cash receipts or the accrual method, which allocate income and expenses between years." *Holland v. United States*, 348 U.S. at 131.

It is clear, therefore, that the trial court violated Section 41 when it permitted the prosecution to ignore this fundamental distinction between the cash and the accrual methods of accounting. This point is sufficient without more to require a reversal as to the third and fourth counts of the indictment, which relate to the year 1945, since it completely eliminates any deficiency for that year.

Since the record also includes reference to "markers" of the Menlo Club and the 186 Club, and respondent has previously used testimony as to them in justification of the inclusion of the B-R accounts receivable in the 1945 closing net worth (see Br. for U. S., pp. 68-71, *Remmer v. United States*, No. 304, October Term, 1953), we point out that the B-R Smoke Shoppe "markers" were of a substantially different nature. Both the Menlo

Club and the 186 Club were card clubs, where the patrons paid an hourly charge to the house for the privilege of playing cards with other patrons. The patrons did not bet against the house, although they did bet against each other. Occasionally, the house loaned money to a player, and carried the loan as a "marker". The inclusion of these markers, representing loans, in the assets of the Menlo Club and the 186 Club is not challenged by petitioner.

The B-R Smoke Shoppe, however, was a book-making establishment where patrons placed bets against the house on horse races. Some patrons of this business were permitted to bet on credit, and when they lost their obligations were carried on the books as "accounts receivable", or "markers", until paid (R. 1360-1). The inclusion of these amounts in petitioner's closing net worth is clearly erroneous.

Nor is there any basis for the contention (see Br. for U.S., pp. 69-70, *Remmer v. United States*, No. 304, October Term, 1953) that this $15,000 consisted of markers of the partners representing withdrawals made by them during the year. There is no evidence that any such withdrawals had been made in 1945, and no basis for inferring that any part of this $15,000 in "accounts receivable" represented partners' drawings.

3. The Charge to the Jury Did Not Conform With the Requirements Outlined in the Holland Case.

The *Holland* opinion emphasizes the importance of clear and comprehensive instructions in net worth cases.

> "Charges should be especially clear, including, in addition to the formal instructions, a summary of the

> nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused."
>
> *Holland v. United States*, 348 U.S. at 129.

This is to be read in conjunction with the basic principles set out in the opinion, including the Government's obligation to make a full and fair disclosure of the results of its investigation.

The charge in this case was incorrect and inadequate in several respects.

a. The Net Worth Method Was Not Properly Explained.

Unlike the *Holland* case, the court in this case gave only a very sketchy statement of the net worth method. There was no "summary of the nature of the net worth method," no statement of "the assumptions on which it rests," and no mention of any "inference available . . . for the accused."

The net worth method is mentioned only in Instructions 14 and 15 (R. 136-8), which are set forth in Appendix E (*infra*, pp. viii-ix) in their entirety.

Insofar as relevant here, these instructions stated only that (1) a defendant's net worth at a given time is the difference between all of his assets and all of his liabilities, (2) an increase in a man's net worth during the year justifies the inference of taxable income if it is shown that he did not get it by gift or inheritance, and (3) non-deductible expenditures should be added to increase in net worth in arriving at taxable income.

Nothing was said about the evidence necessary to establish the starting net worth nor about the prosecution's

her that some day he would tell her why he was so interested (Supp. R. 174, 177-8).

And Judge Goodman's conclusion that Smith regarding Satterly's statement "as being jocular" (Supp. R. 35) is further belied by what Smith told the FBI agent, whose notes made at the time quote the substance of Smith's statements as follows (Supp. R. 167):

> "Felt that Satterly was feeling him out . . . Don't believe he has been in contact with Remmer, but believe he would have made arrangements if reception had been cordial. . ."

In addition, Smith told the FBI agent that Remmer had watched Smith enter the judge's chambers at the time he reported the incident (Supp. R. 167)—an observation which further reveals Smith's thoughts as to Remmer's possible connection with Satterly.

2. *The Smith-Judge Foley Contact.* While nothing was said during this conversation which of itself was derogatory to petitioner, it has significance on the question of the impact of Satterly's remarks. The fact that Smith, after two days of anxious deliberation, decided to report a remark made by a man who was a personal friend as well as a business client, shows that Smith did not consider the remark a joke but thought at least as a serious possibility, that he had received a feeler for a bribe. And Smith reported this to Judge Foley, even though Satterly "did not persist", although Smith was aware of Judge Foley's admonition that communications should be reported to him if the communicator *persisted* in discussing the case after being advised that the juror was not free to discuss it (Supp. R. 53-4).

burden of proof in that respect. Nothing was said about the assumptions inherent in the method, or the circumstantial nature of the case, or the fact that the method is "at best an approximation."

And in spite of the vital importance of the item of cash at the starting point, as evidenced both by the uncontradicted prosecution testimony and the "question mark" designation after the cash item on the prosecution's net worth statement, the jury was not told one word about the significance of this item or the burden of proof respecting it.

Petitioner requested (but was refused) instructions which explained the net worth method in understandable form, pointed out the critical importance of accuracy at the starting point, and stated that the burden of proof on this issue was on the Government rather than the defendant. See Requested Instructions 108, 109, and 114 (R. 79-85). Proper exception was taken to the failure to give these instructions (R. 3493-6).

The jury was thus left without any real notion of how to apply the net worth method to a complex factual case. The fact that the prosecution was permitted (over objection) to introduce its net worth statement with a question mark denoting the amount of cash implied to the jury that it could properly ignore the cash item unless the defendant came forward with proof of the amount.

The Supreme Court's admonition in the *Holland* case that "bare figures have a way of acquiring an existence of their own," and its warning of the "great danger" that once the Government establishes the figures in its

3. *The Smith-FBI contact.* This must surely have impressed upon Smith the seriousness of the incident. The FBI agent did nothing, then or later, to refute the implication that Remmer had been behind the bribe offer. On the contrary, the absence of any advice from the Government that Remmer was not involved could only have made Smith wonder even more whether Remmer was in fact responsible for Satterly's suggestion.

Judge Goodman based his decision in part on the conclusion that the purpose of the FBI investigation was to determine whether *Satterly* had committed an offense, and not to investigate *Smith* "as to his conduct, as was conjectured in the opinion of the Supreme Court" (Supp. R. 37). This, again, misconstrues this court's opinion, for the opinion shows that the vice of the whole situation lies in the impression which the juror might get from the fact that a conversation to which he was a party is being investigated. Not knowing what Satterly might have told the FBI, Smith might well be under subconscious (if not conscious) pressure to avoid any suspicion by advocating a guilty verdict.

Smith knew that Satterly was an ex-convict (he informed the FBI agent of this—Supp. R. 168), and that he was then thinking of buying a gambling establishment in Idaho (where gambling is illegal). It would have been natural for Smith to wonder whether Satterly might contradict Smith's statement of the conversation (which, in fact, Satterly did do at the hearing by denying that it had ever occurred) and might try to protect himself by claiming that Smith was the one who suggested a "deal". The fact that a conviction would remove any possible

net worth computations "the jury may assume that . . . the crime of tax evasion automatically follows," are particularly appropriate here. And the possibility of this was increased, to use the Supreme Court's terminology, by the absence of "guarding instructions".

b. The Instructions on Willfulness Were Not Correct.

The *Holland* opinion declares that willfulness "cannot be inferred from the mere understatement of income" but "must be proven by independent evidence." 348 U.S. at 139.

As we have pointed out above, the great bulk of the deficiency in this case stems from the disallowance by the revenue agents of expense deductions which they felt should be capitalized. It is clear from the record that the decision to treat these as current rather than capital expenditures in the returns was made by the bookkeepers rather than by appellant, and we hardly need add that even the courts have not been able to fix a sharp line between what is deductible as current expense and what must be capitalized as a part of the permanent investment.

In this situation, however, the question of intent was critical. It was equally crucial on whether the partnerships which the prosecution disregarded were fraudulent in a criminal sense, as distinguished from a case of non-recognition for civil tax purposes.

The court refused to give any of appellant's requested instructions on willfulness. The sole explanation of the term "willful" is found in Instruction No. 19 and reads as follows (R. 140):

suspicion could not have escaped him if he thought about the matter at all—as he obviously did.

4. *The Curnow-Boyd incident.* We have already discussed Judge Goodman's belief that this was outside the scope of the hearing. We add at this point that there is no factual basis for considering the incident harmless. The prejudicial effect of a statement to a juror, by a deputy marshal who is also a personal friend, that an attempt had been made to reach one of the jurors, is too obvious to need elaboration. Even if an effort had been made to overcome this prejudicial effect by a full hearing during the trial, it is doubtful if the prejudice could have been overcome. See, for example, the *Stone* case, *supra*, where the conviction was reversed even though the trial judge immediately notified the defense and did everything in his power to neutralize the prejudicial effect of the attempted approach.

But here, there was no neutralization of the remark, and it remained with the juror untarnished by any correction or retraction. Can it be said that the juror was not impressed in the least with this piece of misinformation?

B. THE DENIAL OF PETITIONER'S EFFORTS TO INSPECT AND USE HIS OWN BUSINESS RECORDS IN THE GOVERNMENT'S POSSESSION DEPRIVED HIM OF A FAIR TRIAL.

The denial of petitioner's motions for inspection under Rules 16 and 17, and the quashing of the subpoena for the production of the documents, put petitioner in the incredible position of not being able to use the records of his own businesses in preparing and presenting his defense.

Instruction No. 19

"The word 'wilful' when used in a criminal statute generally means an act done with a bad purpose, but the word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by disregard whether one has the right so to act."[8]

The failure to give any of the requested instructions on willfulness (to which proper exception was taken under Rule 30, R. 3493-6) left the jury with wholly inadequate instructions on this vital issue.

Defendant's Requested Instructions 69, 75, 77, 79, 80, 81, 82, 88, 89 and 90 (R. 73-9) deal with the question of willfulness both in its general sense in tax cases and as involved in the factual content of this case. The substance of these instructions should have been stated to the jury. In order to show the pertinency and correctness of these requests, we summarize and comment on them as follows:

Request No. 69 (R. 73-4) defines willfulness as used in Section 145(b), in accordance with the language of *Spies v. United States* (1943) 317 U.S. 492, 499.

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[8]The giving of a substantially identical instruction was held to be such plain and fundamental error as to require reversal even though no exception was taken to it, in *Bloch v. United States* (CA 9, 1955) ___ F. 2d ___, 55-1 U.S.T.C. Par. 9364 (petition for rehearing pending). Although that decision, which was rendered by another panel of judges of the same circuit, was called to the attention of the panel which decided this case, no mention is made of it in the opinion, which, as already noted, was simply a *per curiam* statement that the judgment should be affirmed. Still another panel of the Ninth Circuit distinguished another holding of the *Bloch* case by emphasizing the instruction quoted above as rendering the charge as a whole erroneous. *Legatos v. United States* (CA 9, 1955) ___ F. 2d ___, 55-1 U.S.T.C. Par. 9443.

The decision of the court below is contrary to the views expressed by this court in *Bowman Dairy Company v. United States* (1951) 341 U.S. 214, as to the purpose and policy of Rules 16 and 17.

The lower court's decision is also in conflict with the decision of another circuit in *Fryer v. United States* (CA D.C., 1953) 207 F. 2d 134; *cert. den., United States v. Fryer* (1953) 346 U.S. 885, petition for rehearing *denied*, 346 U.S. 928.

It is conceded that the documentary materials which petitioner sought to examine and to have produced were evidentiary in character and within the scope of Rules 16 and 17. The Court of Appeals justified the denial of petitioner's motions on these grounds (R. 3754-8): (a) Petitioner's accountants were free to examine these records *before* the indictment; (b) the motions were not timely; and (c) no *specific* showing of prejudice has been made.

None of these reasons justifies the denial of the motions. The pre-indictment inspection afforded to petitioner's representatives was for two purposes: (1) Initially, it was only to prepare Tax Court petitions contesting the jeopardy assessments made in 1949; (2) later, it was to determine the cost to petitioner of a comprehensive accounting analysis for use in conferences with the Bureau of Internal Revenue—an analysis which was never made because the tax liens previously filed against petitioner had made it impossible to pay the substantial accounting fees required for such an analysis. The issues in a criminal case are obviously different from those in a civil proceeding, particularly where (as here) the civil assess-

Request No. 75 (R. 74) distinguishes between the concealment of facts, on the one hand, and, on the other hand, the making of an erroneous or untenable claim based on facts which are not concealed. This is pertinent to the issue of willfulness as applied to the partnerships and to the technical adjustments.

Requests Nos. 77 and 78 (R. 74-75) point out the difference between corrupt intent and honest error. Requests Nos. 82 and 88 (R. 78) are similar in substance.

Requests Nos. 79 and 80 (R. 75-6) state that the specific intent to defraud the United States of taxes must be proved beyond a reasonable doubt.

Requests Nos. 81 and 89 (R. 77-8) state that, to convict, the jury must find that the prohibited acts were "done purposely in bad faith with an intent to evade tax," that "the gist of the offense is an act done with a bad purpose without justifiable excuse," and that "good faith will entitle such defendant to an acquittal."

c. The Court Erroneously Refused to Charge on the Inferences Which Might Be Drawn From the Prosecution's Failure to Produce Books and Records in Its Possession.

One of the basic principles which underlies the *Holland* opinion is that in a net worth case the Government must make a reasonably full investigation and a fair disclosure of what it finds. This is because the burden of proof remains on the Government, because a taxpayer "may be entirely honest and yet unable to recount his financial history," and because the Government's "duty is not to convict but to see that justice is done."

While the discussion of this requirement in the *Holland* case is related to the specific question of the Government's

ments are not based on the net worth method used in the criminal case. If inspection for the limited purpose of preparing pleadings in a civil case is recognized as proper, it is all the more important to permit a defendant to examine his records to prepare for criminal charges subsequently filed against him.

Nor were the motions made out of time. Rule 16 authorizes a motion to inspect and take copies "at any time after the filing of the indictment", and Rule 17(c) provides for a motion to produce subpoenaed documents for advance inspection "at any time prior to trial or prior to the time when they are to be offered in evidence."

The formal motion under Rule 16 was made here two weeks before the trial. It was preceded three weeks earlier by a request of Government counsel to permit inspection—a request which was refused by the Government after a delay of two weeks despite an initial assurance that it would be granted (R. 27). Petitioner could not realistically make the request at an earlier date because, as a result of the tax liens, he had not been able to secure the services of an accountant to make the analysis.[5] The request was made promptly after an accountant was obtained, well in advance of the trial. Nowhere in the record is there any showing that such inspection would have prejudiced the Government in the preparation of its case. On the contrary, the Government's opposition seems to have been based on pique resulting from the fact that, at the time of the grand jury hearing,

[5]His earlier efforts to obtain the release of a portion of his frozen funds for this purpose had been rejected by the Government despite his offer to post a surety bond (R. 50-54).

duty to run down leads furnished by the taxpayer, the court obviously had in mind a basic proposition which is equally applicable to the instant situation. The books and records of the businesses in which petitioner had an interest were obviously pertinent and material. A great mass of such records were turned over to the revenue agents in 1946, 1947, and 1948 and admittedly have been in the Government's possession ever since then. Petitioner's requests to examine them before the trial and to have them produced at the trial were refused by the court.

The Government agents testified that the books and records were incomplete and inadequate (R. 2564, 2869), and the *Holland* opinion points out that an intent to evade may be inferred from incomplete records.

The court should, therefore, have given Requested Instruction No. 129 (R. 87), to the effect that the jury might properly infer, from the prosecution's failure to produce the records in its possession, that their production would be beneficial to petitioner.

Thus, apart from the error in permitting the prosecution to make a wholly unilateral and extrajudicial determination of what records were material, there was a failure to instruct the jury on "the inferences available both for and against the accused," as required by the *Holland* decision.

The failure to give these various instructions cannot be considered harmless. They go to critical issues. They represent the safeguards which the Supreme Court has deemed essential in view of what it described as the "pitfalls inherent in the net worth method."

one of petitioner's attorneys had refused to turn over a portion of petitioner's records for use before the grand jury (R. 39-41).[6]

The unreasonableness of the lower court's statement that no *specific* showing of prejudice was made by petitioner is emphasized by the fact that the records were voluminous (occupying one packing box of 50 cubic feet capacity and several smaller cartons—R. 48), that they had been in the possession of the Government continuously since taken from the various business premises by various revenue agents during the period 1946-48, and that petitioner personally had never had anything to do with the bookkeeping or with the supervision and maintenance of records. Moreover, the two public accountants who had set up and supervised the records had both died before the trial (R. 1394, 1559). How could any *specific* showing of the importance of some *particular* document possibly have been made under these circumstances, in advance of any inspection?

The fact that the documents were business records of the enterprises from which petitioner derived his income

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[6]The record shows that the documents in question were turned over to petitioner's accountant Semenza, in 1949, for use in preparation of the Tax Court petitions, and were subsequently turned over to petitioner's attorney Golden, who was on two weeks' active duty, as a reserve army officer, at the time. Petitioner's attorney Avakian, who had just entered the case as tax counsel, refused to take these records from Golden's office for use before the grand jury without first consulting Golden unless Government counsel stated the contents and significance of the records so as to enable petitioner's attorney, who was himself unfamiliar with the records, to exercise an intelligent judgment; but Government counsel declined to do so (R. 168-177). All of these records were deposited in court by petitioner's counsel during the trial for the Government's use, pursuant to court order (R. 928-9, 1151).

VII. CONCLUSION.

For the foregoing reasons, the court should again issue a writ of *certiorari*, so that the serious questions arising from the clandestine jury contacts and the other important questions which the court did not previously find it necessary to decide may now be determined, and so that the conflicts between the decision of the lower court and the decisions of this court and of the Courts of Appeals in other circuits may be resolved.

Respectfully submitted,

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Attorneys for Petitioner.

LOHSE AND FRY,
Of Counsel.

June, 1955

(Appendices A, B, C, D and E Follow.)

Appendix A

OPINION BELOW.

In the United States Court of Appeals for the Ninth Circuit

ELMER F. REMMER, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 13,281 May 23, 1955

Appeal from the United States District Court for the District of Nevada.

Before MATHEWS, STEPHENS and ORR, Circuit Judges.

PER CURIAM.

In this case, a judgment of the District Court was affirmed by us on May 28, 1953.[1] The Supreme Court granted certiorari[2] and on March 8, 1954, vacated our decision and remanded the case to the District Court[3] with directions to hold a hearing to determine whether an incident which occurred during the trial and was re-

[1]Remmer v. United States, 9 Cir., 205 F. 2d 277.
[2]Id., 346 U.S. 884.
[3]Id., 347 U.S. 227.

was cash in some undetermined amount and that just 28 days before the starting point one specific sum of over $17,000 was placed in the safe deposit box. The Government itself recognizes the existence of a cash fund by inserting a question mark, rather than a zero, for the item of "cash in safe deposit boxes" in its net worth exhibit (Ex. 183, R. 3613).

In computing the income on the net worth method, however, the Government's computations ignored the item of cash, which had the effect of treating the amount of cash as zero. Thus, in effect, the Government's position was this: "We know there was cash in some amount, but it is up to the defendant to prove how much; and if he doesn't prove the amount we are entitled to ignore the cash completely."

This is contrary to the basic proposition laid down in *Holland v. United States* (1954) 348 U.S. 121, that the Government has the burden of establishing the opening net worth with reasonable certainty.

Unlike the *Holland* case and *Friedberg v. United States* (1954) 348 U.S. 142, there is no evidence here of a previously impoverished financial history to support an inference that there was no cash. Rather, there is not even as much background as the Government's showing which this Court held insufficient in *United States v. Calderon* (1954) 348 U.S. 160. And unlike *Calderon* and *Smith v. United States* (1954) 348 U.S. 147, there are no extrajudicial statements or admissions upon which the Government can rely here.

Nor does the long nonpayment of the $1,800 Monohan judgment (from 1939 to 1945) support any inference that

petitioner had no cash, since the Government's own computations credit petitioner with cash of $8,425.51 in three bank accounts as a part of his net worth of $141,837.12 on December 31, 1943 (R. 3589, 3601, 3613).

And unlike the *Holland*, *Friedberg*, *Calderon* and *Smith* cases, where the amount of starting point cash necessary to overcome the deficiency computations ranged from $46,000 to $194,000 and represented from two to five times the amount of the "visible" net worth, the pertinent amount of starting point cash in this case is not large, either in amount or in comparison with the "visible" net worth.

The unreported income computed by the Government for the two years (1944 and 1945) totals $43,494.95 (R. 3613). But the great bulk of this results from technical accounting-type adjustments which would not support any inference of fraud. One item of $15,000 consists of the inclusion at the end of 1945 of $15,000 in accounts receivable of the B-R Smoke Shoppe, representing obligations owed by losing bettors who had been permitted to place bets on credit. (The impropriety of this adjustment, even from the viewpoint of technical tax law, is discussed below.) Another $24,369.49 is accounted for by a variety of accounting adjustments, such as the capitalization of repairs and improvements to a bar and an office, and the treatment of excise taxes on liquor as additional cost rather than as a currently deductible expense. In fact, all but $7,000 of the unreported net income computed by the Government consists of these technical adjustments; and if the opening net worth were increased by only $7,000 (which is just five per cent of the "vis-

Appendix B

JUDGMENT BELOW.

No. 13,281

In the United States Court of Appeals for the Ninth Circuit

ELMER F. REMMER, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

JUDGMENT

Appeal from the United States District Court for the District of Nevada.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada, and was duly resubmitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Filed and entered May 23, 1955.

Paul P. O'Brien, Clerk.

Appendix C

ORDER STAYING ISSUANCE OF MANDATE.

No. 13,281

In the United States Court of Appeals for the Ninth Circuit

ELMER F. REMMER,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Upon application of Spurgeon Avakian, counsel for the appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 26 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of *certiorari* to be made by the appellant herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before June 22, 1955. In the event the petition for writ of *certiorari* is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Clifton Mathews
United States Circuit Judge.

Dated: San Francisco, Calif.
June 3, 1955.

(Endorsed:) Filed June 3, 1955.

Paul P. O'Brien, Clerk.

Appendix D

STATUTES AND RULES INVOLVED

Internal Revenue Code of 1939:

Section 41. General Rules.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U.S.C. 1946 ed., Sec. 41.)

Section 145. Penalties.

* * * * * * *

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than

$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(26 U.S.C. 1946 ed., Sec. 145(b).)

Federal Rules of Criminal Procedure:

Rule 16. Discovery and Inspection:

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17. Subpoena;

* * * * * * *

(c) *For production of documentary evidence and of objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Appendix E

INSTRUCTIONS ON NET WORTH METHOD.

Instruction No. 14

"The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the method of accounting regularly employed in keeping the books of the taxpayer; but if no such method of accounting has been employed, or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as does fairly reflect the income.

"The Government is authorized by law, if the books of the taxpayer are found to be inadequate, to adopt a reasonable method of ascertaining income. In this case it has undertaken to find out what the defendant was worth at the beginning of each year involved and what he was worth at the end of that year, so as to show what he had accumulated as income in the meantime.

"If, at the end of a year, a man has in his possession more property than he had at the beginning of the year, it goes without saying that he got it from some place; and, if it is shown that he did not get it by gift or inheritance or loan, it may be inferred that it was part of his taxable income."

Instruction No. 15.

"The Government has placed before you evidence relating to the defendant's net worth at the end of each of the years 1943, 1944, 1945, and 1946. A defendant's net worth

at a given time is the difference between all of his assets and all of his liabilities. Loans receivable are to be considered as assets and loans payable are to be considered as liabilities in computing the net worth. Increase in net worth for any year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year. In order to compute the defendant's taxable net income by this method you should add the defendant's living and other nondeductible expenses for that year as shown by the evidence and the income taxes which he paid during that year to the increase in net worth. These expenditures should be added because they are not represented in the assets which the defendant has accumulated and are not deductible expenses.

"Expenditures which are deductible under the income tax laws are immaterial and of no significance in computing net income on the so-called 'net worth and expenditures' method. The law provides that a deduction shall be allowed for all the ordinary and necessary expenses paid or incurred in carrying on any trade or business. The term 'ordinary and necessary business expense' does not have any specific definition, but it refers generally to expenditures which have a reasonable relationship to the carrying on of a business."